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Punitive Damage Liability of Municipal Corporations in Pennsylvania

I. Introduction

The general rule in the United States is that a plaintiff has no right to recover exemplary or punitive damages¹ from a municipal corporation,² or a state,³ in the absence of statutory authority.⁴

1. Synonyms for these terms are "punitory" or "presumptive" damages, "vindictive damages," "smart-money," "added," or "imaginary" damages. H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 29, at 27 (1961). Closely related to punitive damages is the statutory device of double or treble damages, used in nearly every state. This technique was first used in England in 1278. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 (1957). Pennsylvania has numerous statutes authorizing such damages. See, e.g., 17 PA. CONS. STAT. ANN. § 1301.18a (Purdon Supp. 1979-80) (double damages if employer should deprive employee of employment because of absence on jury duty). While important differences exist between statutorily imposed multiple damages and common-law punitive damages, see *Cieslewicz v. Mut. Serv. Cas. Ins. Co.*, 84 Wis. 2d 91, 101-02, 267 N.W.2d 595, 600-01 (1978), the rationale for insulating municipal corporations from punitive damage liability also justifies prohibiting statutory multiple damages against municipal corporations.

2. The following cases hold that punitive damages cannot be imposed upon a municipal corporation: *Smith v. District of Columbia*, 336 A.2d 831 (D.C. 1975); *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965), *aff'g*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964); *Lauer v. YMCA of Honolulu*, 57 Haw. 390, 557 P.2d 1334 (1976); *City of Gary v. Falcone*, ___ Ind. App. ___, 348 N.E.2d 41 (1976); *McHugh v. City of Wichita*, 1 Kan. App. 2d 180, 563 P.2d 497 (1977); *Foss v. Maine Turnpike Auth.*, 309 A.2d 339 (Me. 1973); *Desforge v. City of West Saint Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Urban Renewal Agency of Aberdeen v. Tackett*, 255 So. 2d 904 (Miss. 1971); *Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968); *Rascoe v. Town of Farmington*, 62 N.M. 51, 304 P.2d 575 (1956); *Brown v. Village of Deming*, 56 N.M. 202, 243 P.2d 609 (1952); *Nixon v. Oklahoma City*, 555 P.2d 1283 (Okla. 1976); *Clarke v. City of Greer*, 231 S.C. 327, 98 S.E.2d 751 (1957). See also 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.18a at 161 (3d ed. 1977); Annot., 19 A.L.R.2d 903 (1951); notes 32-71 and accompanying text *infra*.

A "municipal corporation" is defined, in its historical and strict sense, as "the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns." 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 32 (5th ed. 1911) (quoted in *Tranter v. Allegheny County Auth.*, 316 Pa. 65, 81-82, 173 A. 289, 296 (1934)). Defined in this technical sense, the term "municipal corporation" includes only cities, boroughs, towns, parishes, and villages. In this comment, however, the term is used in a broader sense that includes public or quasi corporations, such as counties, townships, school districts and road districts, which are created solely as instrumentalities of the state. See *Egan Independent Consol. School Dist. No. 1 of Moody County v. Minnehaha County*, 65 S.D. 32, 35-36, 270 N.W. 527, 529 (1936); Phillips, *Legal Position of Local Units of Government in Pennsylvania*, 13 TEMP. L.Q. 466, 481-87 (1939).

3. The following cases hold that punitive damages cannot be recovered from a state: *State v. Sanchez*, 119 Ariz. 64, 579 P.2d 568 (1978); *McCandless v. State*, 6 Misc. 2d 391, 395, 166 N.Y.S.2d 272, 277 (Ct. Cl. 1956), *modified and rev'd in part on other grounds*, 3 App. Div. 2d 600, 162 N.Y.S.2d 570 (1957), *aff'd*, 4 N.Y.2d 797, 149 N.E.2d 530, 173 N.Y.S.2d 30 (1958); *Drain v. Kosydar*, 54 Ohio St. 2d 49, 374 N.E.2d 1253 (1978); *Berke v. Ohio Dep't of Pub. Welfare*, 52 Ohio App. 2d 271, 369 N.E.2d 1056 (1976).

4. There is authority to the contrary. See *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp.

Courts have disagreed on whether Pennsylvania follows this majority rule. One federal court⁵ has interpreted Pennsylvania law as permitting the recovery of punitive damages from a municipal corporation. A court of common pleas⁶ later declared this federal decision to be in error, and held that Pennsylvania law prohibits such damages against a municipality. The recently enacted Political Subdivision Tort Claims Act⁷ has further complicated analysis in this area since it neither clearly permits nor prohibits a punitive damage award against a municipal corporation in Pennsylvania.⁸ In an effort to clarify this area of law in Pennsylvania, this comment will analyze Pennsylvania law on municipal liability for punitive damages and compare it to the law of other jurisdictions.

II. Preliminary Considerations

A. *Municipal Tort Liability in Pennsylvania*

The doctrine of governmental immunity,⁹ which applied to municipal and local governments, townships, and school districts, was abolished in Pennsylvania in *Ayala v. Philadelphia Board of Public Education*.¹⁰ Prior to the *Ayala* decision a municipal corporation in

667, 682-83 (E.D. Pa. 1967) (applying Pennsylvania law), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); *Young v. City of Des Moines*, 262 N.W.2d 612, 620-22 (Iowa 1978); *Hayes v. State*, 80 Misc. 2d 498, 503-07, 363 N.Y.S.2d 986, 991-95 (Ct. Cl. 1975), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (1975), *aff'd*, 40 N.Y.2d 1044, 360 N.E.2d 959, 392 N.Y.S.2d 282 (1976). See notes 78-105 and accompanying text *infra*.

5. *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667, 682-83 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969). See notes 136-47 and accompanying text *infra*.

6. *Santucci v. Windber Borough*, 31 Som. 281 (Pa. C.P. 1975). See notes 148-56 and accompanying text *infra*.

7. The Political Subdivision Tort Claims Act, 53 PA. CONS. STAT. ANN. § 5311.101 (Purdon Supp. 1979-80) was signed into law by the Governor on November 26, 1978.

8. See notes 157-74 and accompanying text *infra*.

9. The term "governmental immunity" refers only to that immunity applied to political subdivisions or governmental entities other than the Commonwealth itself. *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 587 n.2, 305 A.2d 877, 878 n.2 (1973). The term "sovereign immunity," on the other hand, refers only to the immunity of the Commonwealth. *Specter v. Commonwealth*, 462 Pa. 474, 478, 341 A.2d 481, 482-83 (1975). Sovereign immunity was abolished by the Pennsylvania Supreme Court in *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), but was partially reinstated by the legislature. 42 PA. CONS. STAT. ANN. § 5110 (Purdon Supp. 1979).

10. 453 Pa. 584, 305 A.2d 877 (1973), *noted in*, 25 MERCER L. REV. 969 (1974); 8 U. RICH. L. REV. 372 (1974).

Rejecting arguments that (1) the abolition of governmental immunity would result in a multiplicity of suits against municipalities with concomitant financial burdens; (2) that government functions would be curtailed as a result of tortious liability; and (3) that the doctrine of stare decisis requires that the doctrine of governmental immunity be maintained, the *Ayala* court advanced four reasons for removing governmental immunity. 453 Pa. at 595, 596, 603, 305 A.2d at 882-83, 886. First, a municipality can easily pass on the risk of liability to its citizens. *Id.* at 593, 305 A.2d at 881-82. Second, citizens who enjoy the fruits of the municipal enterprise, must also accept its risks and attendant responsibilities. *Id.* at 594, 305 A.2d at 882. Third, cities are capable of inflicting great harm, and their civil liabilities should be viewed as

Pennsylvania enjoyed immunity from liability for tortious acts committed while acting in a governmental capacity. When acting in a proprietary capacity, however, a municipal corporation was held liable for its torts in the same manner as a private corporation or an individual.¹¹ The proprietary-governmental capacity distinction was not easily discernable, and was subject to substantial criticism.¹²

part of the normal and proper costs of public administration. *Id.* at 594-95, 305 A.2d at 882. Last, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions. *Id.* at 599, 305 A.2d at 884.

11. The governmental-proprietary standard is "a court-made distinction as to the types of activities which governmental bodies perform, created to ameliorate the harshness of total governmental immunity." *Campbell v. State*, 259 Ind. 55, 58, 284 N.E.2d 733, 735 (1972). In jurisdictions that continue to recognize this distinction, a municipal government is viewed as a composite of two functions, a private, proprietary function, and a public, governmental function as the arm or agent of the state. When a municipality is entrusted with public or governmental duties by the state, it is immune from tort liability arising from the execution of that duty. A municipal corporation, however, is liable for torts committed in the performance of municipal or corporate duties as distinguished from governmental duties. 18 E. McQUILLIN, *supra* note 2, §§ 53.23-.24 at 202-09. The rationale for this distinction is that when a municipality acts as an agent or representative of the state in performing governmental functions, it shares the state's immunity, but it has no immunity when it acts for its own private or pecuniary benefit. James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 623 (1955). Exactly what constitutes a proprietary function as opposed to a governmental function has never been clearly enunciated by the courts or legislatures, and this failure to establish a criteria has led to confusion in the application of the doctrine of governmental immunity. K. DAVIS, *ADMINISTRATIVE LAW TEXT*, § 25.01, at 468 (3d ed. 1972). Broadly speaking, however, the two functions may be classified as follows: "activities of fire prevention, police, education, and general government are governmental; municipal railways, airports, gas, water, and light systems are proprietary; activities involving streets, sidewalks, playgrounds, bridges, viaducts, and sewers are governmental in some jurisdictions and proprietary in others." Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 442 (1941). For a discussion of the distinction between governmental and proprietary functions in Pennsylvania, see generally J. VANDERZIEL, *MUNICIPAL TORT LIABILITY* (1967); Phillips, *Tort Liability of Quasi Corporations in Pennsylvania*, 32 TEMP. L.Q. 1 (1958); Phillips, *Legal Position of Local Units of Government in Pennsylvania*, 13 TEMP. L.Q. 466 (1939); Schulz, *The Liability of Municipal Corporations for Torts in Pennsylvania*, 40 DICK. L. REV. 137 (1936); Comment, *Governmental Tort Immunity - Role of Courts in Modifying Law*, 7 DUQ. L. REV. 468 (1969); Comment, *Governmental Immunity from Tort Liability: Pennsylvania's Trend Toward Abolition*, 4 DUQ. L. REV. 441 (1966); Note, *The Enigma of Municipal Immunity*, 65 DICK. L. REV. 245 (1961); Note, *Municipal Tort Liability in Pennsylvania-Checkered Immunity*, 100 U. PA. L. REV. 92 (1951); Note, *Tort Liability of Municipal Corporations in Pennsylvania*, 17 U. PITT. L. REV. 674 (1956); 4 U. PITT. L. REV. 138 (1938).

12. Pennsylvania decisions showed marked disagreement on which functions were governmental or public and which were private or corporate, and functions held to be governmental in some cases were held to be corporate in others. Compare *Shields v. Pittsburgh School Dist.*, 408 Pa. 388, 184 A.2d 240 (1962) (operation of playground during vacation is a governmental function) with *Morris v. Mount Lebanon Township School Dist.*, 393 Pa. 633, 144 A.2d 737 (1958), decided four years earlier (operation of summer recreation program is a proprietary function). See Mr. Justice Cohen's statement in the *Morris* case: "Perhaps there is no issue known to the law which is surrounded by more confusion than the question whether a given municipal operation is governmental or proprietary in nature." *Id.* at 637, 144 A.2d at 739. See also *Biello v. Pennsylvania Liquor Control Bd.*, 454 Pa. 179, 184-85, 301 A.2d 849, 851-52 (1973); *Boorse v. Springfield Township*, 377 Pa. 109, 113-35, 103 A.2d 708, 711-21 (1954) (Musmanno, J., dissenting). For criticism of the governmental-proprietary distinction, see Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937); Doddridge, *Distinction between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1925); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

The *Ayala* decision rendered a municipal corporation in Pennsylvania liable for its negligence in the same manner as a private person or corporation.¹³ A governmental body, therefore, became liable under the doctrine of respondeat superior for injuries negligently caused by its agents, servants, and employees acting within the scope of their employment.¹⁴ The Pennsylvania legislature, reacting to the *Ayala* decision, has recently enacted the "Political Subdivision Tort Claims Act"¹⁵ that provides a comprehensive procedure for the presentation of tort claims against political subdivisions¹⁶ and substantially limits the tort liability of municipal corporations in Pennsylvania.¹⁷ It is not certain, however, whether this act permits or prohibits a recovery of punitive damages from a municipal corporation.¹⁸

B. Punitive Damages in Pennsylvania

Pennsylvania adheres to the majority view that punitive damages are not intended to compensate the injured plaintiff, but rather are imposed to both punish the defendant and deter him and others from similar outrageous conduct.¹⁹ They are allowed for torts that

13. *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 305 A.2d 877 (1973); *King v. Sullivan*, 68 Pa. D. & C.2d 318, 324 (C. P. Adams 1974). The removal of immunity, however, does not render a municipality liable for all harm that results from its activities. It does not impose absolute or strict liability upon a municipality. The abolition of immunity merely "subjects it [the municipal corporation] to the same rules as private persons or corporations if a duty has been violated and a tort has been committed." *Oroz v. Board of County Comm'rs of Carbon County*, 575 P.2d 1155, 1158 (Wyo. 1978). Cf. *Duran v. City of Tucson*, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (abrogation of doctrine of governmental immunity removes the defense of immunity, but does not create any new liability for a municipality). See also *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220, 199 N.W.2d 158 (1972); *Short v. Khanka, Inc.*, 69 Mun. 179 (Pa. C.P. Northam. 1975).

14. *Oroz v. Board of County Comm'rs. of Carbon County*, 575 P.2d 1155, 1158 (Wyo. 1978). See also *Devers v. City of Scranton*, 308 Pa. 13, 161 A. 540 (1932). Before a municipality can be liable for the torts of its officers, agents, or servants under the rule of respondeat superior, there must exist (1) a relation of master and servant between the municipality and the tortfeasor; (2) the act must be within the scope of the duties of the officer, agent, or servant; and (3) the act cannot be ultra vires. 18 E. McQUILLIN, *supra* note 2, § 53.65 at 293.

15. 53 PA. CONS. STAT. ANN. § 5311.101 (Purdon Supp. 1979-80). The Pennsylvania Supreme Court had frequently appealed to the legislature to enact a comprehensive tort claims statute. See, e.g., *Biello v. Pennsylvania Liquor Control Bd.*, 454 Pa. 179, 186 n.3, 301 A.2d 849, 852 n.3 (1973); *Supler v. North Franklin Township School Dist.*, 407 Pa. 657, 660, 182 A.2d 535, 537 (1962); *Stouffer v. Morrison*, 400 Pa. 497, 502-03, 162 A.2d 378, 381 (1960) (Cohen, J., concurring); *Morris v. Mount Lebanon Township School Dist.*, 393 Pa. 633, 635-36, 144 A.2d 737, 738 (1958).

16. The Act defines "political subdivision" as,

[a]ny county, city, borough, incorporated town, township, school district, vocational school district, intermediate city, municipal authority, home rule, optional plan or optional charter municipality, any authority created by one or more political subdivisions, and any board, commission, committee, department, instrumentality, or entity thereof designated to act in behalf of one or more political subdivisions.

53 PA. CONS. STAT. ANN. § 5311.102 (Purdon Supp. 1979-80).

17. See notes 157-74 and accompanying text *infra*.

18. *Id.*

19. *Hughes v. Babcock*, 349 Pa. 475, 37 A.2d 551 (1944); *Esmond v. Liscio*, 209 Pa. Super. Ct. 200, 224 A.2d 793 (1966). Pennsylvania has adopted the rule of punitive damages

are committed "wilfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured."²⁰ An act of negligence is not in itself a sufficient basis for awarding punitive damages.²¹ Since punitive damages are not intended to compensate, the plaintiff has no "right" to the award of punitive damages.²²

In determining whether punitive damages should be given, "the act itself together with all the circumstances including the motive of the wrongdoers and the relations between the parties should be considered."²³ Evidence of the defendant's actual wealth is admissible to determine the amount that would properly punish the defendant;²⁴ nevertheless, punitive damages must bear a reasonable relation to the actual damages suffered by the plaintiff.²⁵

set forth in the RESTATEMENT OF TORTS § 908 (1939). See *McSparan v. Pennsylvania R.R. Co.*, 258 F. Supp. 130 (E.D. Pa. 1966); *Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963); *Focht v. Rabada*, 217 Pa. Super. Ct. 35, 268 A.2d 157 (1970). Section 908 provides as follows:

§ 908. Punitive Damages

(1) "Punitive damages" are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct.

(2) Where punitive damages are permissible, their allowance and amount are within the discretion of the trier of fact. In assessing such damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant.

RESTATEMENT OF TORTS § 908 (1939). See also RESTATEMENT (SECOND) OF TORTS § 908 (1979); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, §§ 77-85 (1935). For a discussion of the history of punitive damages in England and the United States, see Belli, *Punitive Damages: An Historical Perspective*, 13 TRIAL No. 12, 40 (1977); Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, in DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 4 (1969); Walther & Plein, *Punitive Damages: A Critical Analysis*; Kink v. Combs, 49 MARQ. L. REV. 369 (1965); Comment, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158 (1966). For a history of their use in Pennsylvania, see Note, *Punitive Damages for Defamation in Pennsylvania*, 4 U. PITT. L. REV. 92 (1938).

20. *Thompson v. Swank*, 317 Pa. 158, 159, 176 A. 211 (1934). *Accord*, *Phillip v. United States Lines Co.*, 240 F. Supp. 992, 994 (E.D. Pa. 1965); *Cervi v. Mori*, 122 Pa. Super. Ct. 355, 186 A. 261 (1936).

21. *Medvez v. Choi*, 569 F.2d 1221, 1226 (3d Cir. 1977). See also *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 A. 816 (1888); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 10 (4th ed. 1971).

22. *Hilbert v. Roth*, 395 Pa. 270, 276, 149 A.2d 648, 652 (1959); Comment, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 DICK. L. REV. 585 (1971).

23. *Chambers v. Montgomery*, 411 Pa. 339, 345, 192 A.2d 355, 358 (1963).

24. *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976); *Aland v. Pyle*, 263 Pa. 254, 106 A. 349 (1919); *Mathies v. Mazet*, 164 Pa. 580, 30 A. 434 (1894); *Hannigan v. S. Klein's Dept Store*, 1 Pa. D. & C.3d 339 (C.P. Phila. 1976), *aff'd per curiam*, 244 Pa. Super. Ct. 597, 371 A.2d 872 (1976); RESTATEMENT OF TORTS § 908, Comment e (1939). See also *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163, 1169 (E.D. Pa. 1971). Cf. *Johnson v. Smith*, 64 Me. 553 (1875) (the defendant may also introduce, in mitigation of exemplary damages, evidence of his lack of means). See note 46 and accompanying text *infra*.

25. *Givens v. W.J. Gilmore Drug Co.*, 337 Pa. 278, 10 A.2d 12 (1940); *Golomb v. Korus*, — Pa. Super. Ct. —, 396 A.2d 430 (1978); W. PROSSER, *supra* note 21, § 2, at 14.

The courts are divided on whether an insurer may be held liable, under a liability policy, for claims against the insured for punitive or exemplary damages. Most courts that hold an insurance company not liable for punitive damages base their decision on public policy grounds. The dual purpose of punitive damages—to punish and deter—would not be fulfilled since insurance coverage would merely shift the punishment to the innocent premium payers

C. Punitive Damage Liability of Private Corporations in Pennsylvania

The federal courts and many state courts will not permit punitive damages against a corporation for misconduct of a servant or agent unless the superior officers of the corporation order, participate in, or ratify the outrageous misconduct of the agent or servant.²⁶ This view is called the complicity rule.²⁷ Pennsylvania follows the less restrictive vicarious liability rule, which imposes punitive damages on a corporation whenever the agent or employee would be liable, regardless of whether the corporation authorized or ratified the employee's or agent's act.²⁸ The leading Pennsylvania case on this

of the insurance company, and it would allow the guilty insured to escape the full burden of punitive damages. *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *Padavan v. Clemente*, 43 App. Div. 2d 729, 350 N.Y.S.2d 694 (1973); *Esmond v. Liscio*, 209 Pa. Super. Ct. 200, 224 A.2d 793 (1966). Those cases that permit insurance coverage of punitive damages hold that the public policy considerations against such coverage are outweighed by the public policy that an insurance company that accepted a premium for covering liability for punitive damages should honor its contractual obligation. *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341 (Tex. Civ. App. 1972). Moreover, most courts hold that no public policy against extending insurance coverage to punitive damages exists when the insured's liability is based on respondent superior, rather than on any personal wrongful act. *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934); *Grant v. North River Ins. Co.*, 453 F. Supp. 1361 (N.D. Ind. 1978); *Sterling Ins. Co. v. Hughes*, 187 So. 2d 898 (Fla. Dist. Ct. App. 1966); *Esmond v. Liscio*, 209 Pa. Super. Ct. 200, 224 A.2d 793 (1966); *Annot.*, 20 A.L.R.3d 343, 351 (1968). *But see* *City of Newark v. Hartford Accident & Indem. Co.*, 134 N.J. Super. 537, 342 A.2d 513 (1975) (even though city's liability insurance policy provided coverage for damages arising out of torts committed by police in attempting to make an arrest or resisting attempted escape, public policy precluded indemnification or defense by insurer of any claim for punitive damages). *See also* Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 890-92 (1976); Zuger, *Insurance Coverage of Punitive Damages*, 53 N.D. L. REV. 239 (1976).

Pennsylvania's new Political Subdivision Tort Claims Act authorizes a municipal corporation "to purchase insurance on itself or its employees for *any liability* arising from the performance of their duties within the scope of their employment." 53 PA. CONS. STAT. ANN. § 5311.701 (Purdon Supp. 1979-80) (emphasis added). *Cf.* *Royal Indem. Co. v. City of Philadelphia*, 1 Phila. C. R. 110 (Pa. C.P. 1977) (insurance company was required to indemnify the city for punitive damages that were awarded against the city under an insurance policy in which the city was the insured).

26. *Lake Shore and Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893); *Great Atl. & Pac. Tea Co. v. Lethcoe*, 279 F.2d 948 (4th Cir. 1960); *Griswold v. Hollywood Turf Club*, 106 Cal. App. 2d 578, 235 P.2d 656 (1951); *Winkler v. Hartford Accident & Indem. Co.*, 66 N.J. Super. 22, 168 A.2d 418 (1961); *Stewart v. Potter*, 44 N.M. 460, 104 P.2d 736 (1940); RESTATEMENT OF TORTS § 909 (1939); RESTATEMENT (SECOND) AGENCY § 217(c) (1958). *See also* 10 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4906 (rev. perm. ed. 1978); RESTATEMENT (SECOND) OF TORTS § 909 (1979).

27. *See* *Parris v. St. Johnsbury Trucking Co.*, 395 F.2d 543 (2d Cir. 1968); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967); *Oakview New Lenox School Dist. v. Ford Motor Co.*, 61 Ill. App. 3d 194, 378 N.E.2d 544 (1978). In addition to the federal courts, fifteen states follow the complicity rule. 10 W. FLETCHER, *supra* note 26, § 4906.

28. *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 851-52 (3d Cir. 1964); 5 U. PITT. L. REV. 105, 107-09 (1939). For a general discussion of the relative merits of the complicity and vicarious liability rules, see 10 W. FLETCHER, *supra* note 26, § 4906 at 502-03; Comment, *Liability of Employers for Punitive Damages Resulting From Acts of Employees*, 54 CHI.-KENT L. REV. 829 (1978); Note, *Exemplary Damages Against Corporations*, 30 GEO. L.J. 294 (1942); Note, 70 HARV. L. REV. 517, *supra* note 1, at 526; Note, *Recovery of Punitive Damages From Corporate Defendants for the Tortious Acts of Employees*, 10 LINCOLN L. REV. 207 (1977); Note, 4 U. PITT. L. REV. 92, *supra* note 19, at 100-01; Note, *The Assessment of Punitive*

subject explains this rule as follows: a "corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such [a] right to the plaintiff as against the servant."²⁹

The vicarious liability rule, however, can lead to unfair results when applied in certain situations. Since the justification for the imposition of punitive damages is to punish and deter undesirable conduct, an assessment of these damages is difficult to defend when an otherwise innocent principal is held liable solely on the basis of respondeat superior.³⁰ Recognizing the harshness of this rule, the Supreme Court of Pennsylvania has warned that "[t]oo great caution cannot be exercised in permitting the recovery of punitive damages for the willful or reckless act of a servant not authorized or approved by the master."³¹

III. Rationale for Insulating Municipal Corporations from Punitive Damage Liability

To better understand the punitive damage liability of municipal corporations in Pennsylvania, one must examine the rationales used by courts in other jurisdictions for both denying and permitting recovery of punitive damages from a municipality. The majority of jurisdictions that have chosen to insulate municipalities from liability for punitive damages³² have utilized the three following approaches to arrive at that conclusion: the functional approach, the conceptual deductive approach, and the deferential approach.³³

Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 YALE L. J. 1296 (1961).

29. *Lake Shore & Mich. S. Ry. Co. v. Rosenzweig*, 113 Pa. 519, 544, 6 A. 545, 553 (1886). *Accord*, *Seneca Falls Machine Co. v. McBeth*, 246 F. Supp. 271, 279 (W.D. Pa. 1965); *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 A. 816 (1888); *Gerlach v. Pittsburgh Rys. Co.*, 94 Pa. Super. Ct. 121 (1928).

30. *Tolle v. Interstate Sys. Truck Lines, Inc.*, 42 Ill. App. 3d 771, 773, 356 N.E.2d 625, 626 (1976). *See also* *Mattyasovsky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975); *W. PROSSER*, *supra* note 21, § 2 at 12.

31. *Funk v. Kerbaugh*, 222 Pa. 18, 19, 70 A. 953, 954 (1908). *See also* *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 852 (3d Cir. 1964) ("the conduct of the agent who inflicts the injury complained of must be rather clearly outrageous to justify the vicarious imposition of exemplary damages upon the principal").

32. Some jurisdictions have repudiated the doctrine of exemplary damages altogether. *See W. PROSSER*, *supra* note 21, § 2 at 9 n.61. In these jurisdictions, of course, the recovery of punitive damages will not be permitted against a municipal corporation. *See, e.g.*, *Skidmore v. City of Seattle*, 138 Wash. 340, 244 P. 545 (1926); *Longfellow v. City of Seattle*, 76 Wash. 509, 136 P. 855 (1913).

33. The court in *Ranells v. City of Cleveland*, No. 30780, slip op. at 10-14 (Ohio Ct. App. Sept. 27, 1973), *rev'd*, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975), used these terms in its insightful discussion of the issue of punitive damage liability of municipal corporations. Unfortunately, this decision has not been reported; it is, however, discussed at length in 2 OHIO N. L. REV. 818, 820-21 (1975), and in 7 U. TOL. L. REV. 624, 633-36 (1976).

A. Functional Approach

The approach most often utilized by the courts as a basis for the denial of punitive damages is the functional approach. Courts using this approach have analyzed the purposes behind punitive damages and have examined whether these purposes are fulfilled in cases involving municipal tortfeasors. Their conclusion is that the purposes of punitive damages are "to punish the offender and to deter others from committing similar wrongs,"³⁴ and that these purposes would not be fulfilled in the case of a municipal defendant. They, therefore, refuse to permit punitive damages against a municipal corporation.³⁵

1. *Punitive Purpose Not Fulfilled.*—Cases that follow the functional approach hold that an award of punitive damages against a municipality would violate the basic punitive purpose behind the award.³⁶ A municipal corporation is composed of innocent, tax-paying citizens.³⁷ This group of tax-paying citizens is the same group that is supposed to benefit from the public example set by the punishment of the wrongdoer. Imposition of punitive damages on a municipal corporation places the burden of paying those damages upon the very group that the law seeks to protect through the addition of the extra measure of punishment intended by the award of punitive damages.³⁸ This results in an anomaly since the public sought to be protected by deterring the wrongdoer is punished, though innocent

34. *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965), *aff'g*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964).

35. *See, e.g., State v. Sanchez*, 119 Ariz. 64, 579 P.2d 568 (1978); *Fisher v. City of Miami*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964), *aff'd*, 172 So. 2d 455 (Fla. 1965); *Foss v. Maine Turnpike Auth.*, 309 A.2d 339 (Me. 1973); *Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968); *Brown v. Village of Deming*, 56 N.M. 302, 243 P.2d 609 (1952).

36. *City of Salinas v. Souza & McCue Constr. Co.*, 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967); *Lauer v. YMCA of Honolulu*, 57 Haw. 390, 557 P.2d 1334 (1976); *City of Gary v. Falcone*, ___ Ind. App. ___, 348 N.E.2d 41 (1976); *Herilla v. Mayor & City Council of Baltimore*, 37 Md. App. 481, 378 A.2d 162 (1977); *Nixon v. Oklahoma City*, 555 P.2d 1283 (Okla. 1976); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975).

37. Citizens of a municipality are innocent because they are merely "passive wrongdoers." *City of Lawton v. Johnstone*, 123 Okla. 145, 252 P. 393 (1926). They have little control over the agents of the municipality, as do stockholders of a private corporation. Moreover, a municipal government is not always of their choice. *See Costich v. City of Rochester*, 68 App. Div. 623, 631, 73 N.Y.S. 835, 841 (1902) (differences between a private corporation and a municipal corporation justify awarding punitive damages in the case of the private corporation but not in the case of the municipal corporation). *See also George v. Chicago Transit Auth.*, 58 Ill. App. 3d 692, ___, 374 N.E.2d 679, 680 (1978); *Hunt v. City of Boonville*, 65 Mo. 620, 624-25 (1877). *See Morris, Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1204 (1931): "Municipal corporations are not held liable for punitive damages for the torts of their servants. This would seem justifiable. The money in the treasury is derived from the pockets of taxpayers who have comparatively little to say about the actual management of the corporation's business." *See also Judge Simon's emotional statement in McGray v. City of Lafayette*, 12 Rob. 674, 677, 43 Am. Dec. 239, 241 (La. 1846): "[Punitive damages] can never be allowed against the innocent . . . [and] cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers"

38. *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965), *aff'g*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964). *Accord, Smith v. District of Columbia*, 336 A.2d 831 (D.C. 1975).

of wrongdoing.³⁹ Since it would be "absurd and illogical"⁴⁰ to hold that punishment should be imposed upon the public, courts have declared such a position contrary to public policy,⁴¹ and have denied recovery of punitive damages from a municipal corporation.

2. *No Deterrent Effects.*—Courts adopting the functional approach also declare that the deterrent purpose of punitive damages is not fulfilled when punitive damages are awarded against a municipality. First, a huge award against a municipality will not necessarily deter other employees because even though a municipality may seek indemnity against the wrongdoing employee,⁴² the employee generally will not be able to pay a large punitive damage award that is based upon the wealth of the municipality.⁴³ Second, municipal employees will not exercise care when they know that the costs of their negligence will be paid by their employer rather than from their own financial resources.⁴⁴ Third, a punitive award against a

39. *City of Gary v. Falcone*, ___ Ind. App. ___, 348 N.E.2d 41, 42 (1976).

40. *Santucci v. Windber Borough*, 31 Som. 281, 287 (Pa. C.P. 1975).

41. See, e.g., *Town of Newton v. Wilson*, 128 Miss. 726, 729, 91 So. 419, 420 (1922); *Nixon v. Oklahoma City*, 555 P.2d 1283 (Okla. 1976).

42. An employer, liable for the negligent acts of his employee solely because of the doctrine of respondeat superior, may seek indemnity against the negligent employee, since the liability of the employee is regarded as primary. *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 326, 77 A.2d 368, 370 (1951); *Betcher v. McChesney*, 255 Pa. 394, 396, 100 A. 124, 125 (1917); *Muldowney v. Middleman*, 176 Pa. Super. Ct. 75, 78, 107 A.2d 173, 175 (1954). See RESTATEMENT OF AGENCY § 401, Comment c (1933): "Thus, a servant who, while acting within the scope of employment, negligently injures a third person, although personally liable to such person, is also subject to liability to the principal if the principal is thereby required to pay damages." See also RESTATEMENT (SECOND) OF AGENCY § 401, Comment d (1958). But see *United States v. Gilman*, 347 U.S. 507 (1954) (the United States is not entitled to indemnity from one of its employees after it has been held liable under the Federal Tort Claims Act for injuries negligently caused by the employee); *Political Subdivision Tort Claims Act*, 53 PA. CONS. STAT. ANN. § 5311.304(b) (Purdon Supp. 1979-80) (Pennsylvania municipal corporation is not entitled to indemnity from one of its employees after it has been held liable for injuries negligently caused by the employee).

43. *State v. Sanchez*, 119 Ariz. 64, 67, 579 P.2d 568, 571 (1978); *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965), *aff'd*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964). Another problem a municipality encounters in attempting to exercise its indemnification right occurs in those situations when it is difficult to determine which employees are responsible for the plaintiff's injury. See, e.g., *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969) (city was negligent for allowing an accumulation of gaseous vapors in a sewer, causing an explosion that killed several workmen).

It is unlikely that the difficulty a municipal government experiences in seeking indemnification will deter it from hiring careless employees. As one writer has stated,

[T]here simply is no way to gauge whether a potential employee will become violent when irritated, just as there is no method of determining with certainty whether he will be a good worker. Certainly some investigation into his past employment should be made, but if such investigation and a personal interview do not indicate a violent or malicious tendency, should an innocent employer be further punished for an act of his employee which he could not possibly have predicted? Has not the innocent employer suffered enough for his bad luck in hiring the tortfeasor by making full compensation to the injured party?

Duffy, *supra* note 19, at 13.

44. *Rieser v. District of Columbia*, 563 F.2d 462, 481 (D.C. Cir. 1977); *City of Gary v. Falcone*, ___ Ind. App. ___, 348 N.E.2d 41, 42 (1976). See also *Morris*, *supra* note 37, at 1204.

municipality is not justified merely because of its possible deterrent impact on other municipal corporations.⁴⁵

Other means are available to deter willful and wanton conduct on the part of a municipal officer.⁴⁶ The Supreme Court of Missouri suggested the following method: "It is assumed that public officials will do their duty, and if discipline of a wrongdoing municipal employee is indicated, appropriate measures are available through the electorate . . . without recourse to punitive awards through the courts."⁴⁷ A better method of deterring municipal employee wrongdoing is simply to have the punitive damage award assessed only against the employee,⁴⁸ based upon his own financial resources, rather than holding the municipality liable for punitive damages, and then forcing it to seek indemnification against the employee. This approach not only punishes and deters employee misconduct,

45. See *Williams v. City of New York*, 508 F.2d 356, 361 (2d Cir. 1974) (court refused to engage in speculation that a punitive award against the City of New York would be justified, in whole or part, for its deterrent impact on other cities).

46. A compensatory damage award in itself will have a deterrent effect, because it causes the defendant and other potential wrongdoers to realize that if they repeat their offense, they will be forced to repair the harm done to the plaintiff. Note, 70 HARV. L. REV. 517, *supra* note 1, at 523. Compensatory damages alone, however, will not act as a deterrence in those torts, such as conversion, which involve wrongful gains to the defendant, since compensatory damages will at most restore the wrongdoer to the *status quo ante* and may even leave him with a profit. See, e.g., *Funk v. Kerbaugh*, 222 Pa. 18, 70 A. 953 (1908), in which the defendant willfully carried out blasting in such a way as to destroy the plaintiff's buildings "because it was cheaper to pay damages . . . than to do the work in a different way." *Id.* at 19, 70 A. at 954. See Note, 70 HARV. L. REV. 517, *supra* note 1, at 522.

47. *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968). One criticism of the *Chappell* approach is that it makes the erroneous assumption that the only municipal employees that are guilty of willful, wanton, or malicious conduct are elected officials. On the contrary, many malicious torts are committed by non-elected public employees who, because of the civil service laws, could not be easily removed by the electorate. See also *Morris*, *supra* note 37, at 1204: "It is not likely that the political employee will be punished when the power of punishing him is in the hands of his political patron, because of the outcome of a damage suit against the city. Assessment of punitive damages against a city would probably impoverish the public treasury without serving the admonitory function."

48. Many states have indemnity statutes requiring municipal corporations to provide for the payment of judgments rendered against a municipal officer or employee for damages caused by his negligence while engaged in the performance of his governmental duties and within the scope of his employment. See, e.g., ILL. ANN. STAT. ch. 24, § 1-4-5 (Smith-Hurd 1962); 18A N.J. STAT. ANN. § 16-6 (West 1968); 53 PA. CONS. STAT. ANN. § 5311.304(a) (Purdon Supp. 1979-80). See also *Andrews v. City of Chicago*, 37 Ill. 2d 309, 226 N.E.2d 597 (1967); Annot., 71 A.L.R.3d 90 (1976). Most of these statutes, however, deny indemnification for willful and wanton misconduct of public employees. *Eifert v. Bush*, 27 App. Div. 2d 950, 279 N.Y.S.2d 368 (1967), *aff'd*, 22 N.Y.2d 681, 238 N.E.2d 759, 291 N.Y.S.2d 372 (1968); 53 PA. CONS. STAT. ANN. § 5311.307 (Purdon Supp. 1979-80). See also *Karas v. Snell*, 11 Ill. 2d 233, 142 N.E.2d 46 (1957).

In Pennsylvania, some personal immunity for tortious conduct is granted to municipal officials, *Montgomery v. City of Philadelphia*, 392 Pa. 178, 140 A.2d 100 (1958), however, they are not immune from tort liability when proof of wanton and malicious conduct is shown. *Burton v. Fulton*, 49 Pa. 151 (1865); *Yealy v. Fink*, 43 Pa. 212 (1862); *Lehnig v. Felton*, 235 Pa. Super. Ct. 100, 340 A.2d 564 (1975); *Ammlung v. City of Chester*, 224 Pa. Super. Ct. 47, 302 A.2d 491 (1973); *DuBree v. Commonwealth*, 8 Pa. Commw. Ct. 567, 303 A.2d 530 (1973), *vacated*, 481 Pa. 540, 393 A.2d 293 (1978); *Walters v. Evans*, 47 D. & C.2d 419 (C.P. Phila. 1969), *aff'd*, 218 Pa. Super. Ct. 141, 279 A.2d 286 (1971). Accord, Political Subdivision Tort Claims Act, 53 PA. CONS. STAT. ANN. § 5311.307 (Purdon Supp. 1979-80).

but also advances the public policy of judicial economy by reducing the number of legal proceedings.⁴⁹

3. *Prejudicial Effect of the Wealth of a Municipality.*—Another consideration discussed by those courts that follow the functional approach is the rule that permits admission of evidence of the wealth of a tortfeasor to help determine the amount of punitive damages that should be awarded.⁵⁰ Evidence of the financial condition of the tortfeasor is admissible since a relatively small damage award would be adequate to punish a poor man, whereas a much greater sum would be needed to punish a rich man.⁵¹ Many courts warn that if this rule is applied to municipalities, it will permit evidence of their unlimited taxing powers. This situation would have a twofold effect. First, a jury would have difficulty in estimating the amount of punitive damages that would adequately punish and deter a governmental unit,⁵² and second, evidence of the unlimited taxing power of a municipality would have a prejudicial effect upon the jury.⁵³ Several courts have denied an award of punitive damages against a municipality for these reasons.⁵⁴

49. Many courts and commentators have argued that the availability of a punitive damage award against a municipal corporation is necessary to deter governmental infringement of constitutional rights. Young v. City of Des Moines, 262 N.W.2d 612, 622 (Iowa 1978); Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV.-MAR. L. REV. 397, 412 (1967). See McGray v. City of Lafayette, 12 Rob. 674, 682, 43 Am. Dec. 239, 246 (La. 1846) (Bullard, J., dissenting) ("it is mainly by means of fearless and independent juries awarding exemplary damages, that the rights of the citizens can be adequately protected, and violence and outrage suppressed"). It seems ironic that punitive damages, which originated in England to deter the government from violating personal liberties, see Wilkes v. Wood, 98 Eng. Rep. 489 (1763); Huckle v. Money, 95 Eng. Rep. 768 (1763), are now generally prohibited against the government in the United States. Cf. Rookes v. Barnard, 1 All E.R. 367 (1964) (England abolished doctrine of punitive damages except when they could serve a useful purpose, by penalizing oppressive, arbitrary, and unconstitutional action by government servants, or conduct calculated to make a profit for the actor). For a discussion of the damage remedies available against a municipality for violation of the federal civil rights acts, see Comment, *New Damage Remedies for Violations of Constitutional Rights*, 31 BAYLOR L. REV. 67 (1979); Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall?* A Survey of the Circuits, 16 DUQ. L. REV. 373 (1977-78); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976); Note, *Municipal Law: Expanding Damage Remedies in Federal Courts for Municipal Deprivation of Constitutional Rights*, 30 OKLA. L. REV. 944 (1977).

50. State v. Sanchez, 119 Ariz. 64, 67, 579 P.2d 568, 571 (1978); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965), *aff'd*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964). Nearly all states permit admission of evidence concerning the wealth of the defendant as bearing upon the issue of punitive damages. W. PROSSER, *supra* note 21, § 2 at 14 n.13; Note, 70 HARV. L. REV. 517, *supra* note 1, at 528. See note 24 and accompanying text *supra*.

51. State v. Sanchez, 119 Ariz. 64, 67, 579 P.2d 568, 571 (1978).

52. City of Gary v. Falcone, ___ Ind. App. ___, 348 N.E.2d 41, 42 (1976).

53. Fisher v. City of Miami, 160 So. 2d 57, 62 (Fla. Dist. Ct. App. 1964), *aff'd*, 172 So. 2d 455 (Fla. 1965) (Carroll, J., dissenting).

54. See, e.g., State v. Sanchez, 119 Ariz. 64, 67, 579 P.2d 568, 571 (1978). In reality, the taxing power of a municipality is not unlimited, for citizens will not tolerate unlimited tax increases. Nonetheless, even if the taxing capacity of the municipality could be determined, and a jury based punitive damages upon this amount, the award would still serve no punitive purpose since the innocent taxpayers would still bear the burden of paying the award. See notes 36-39 and accompanying text *supra*.

One judge has criticized this rationale, suggesting that the law provides adequate protection against an excessive punitive damage award that is grounded upon evidence of the unlimited wealth of a municipality.⁵⁵ Punitive damage awards are subject to the rule that exemplary damages must bear a reasonable relation to the amount of compensatory damages, and they can be reduced by appropriate action of the trial or appellate court.⁵⁶ This argument, however, is unpersuasive, for the rule that requires a relation between punitive damages and actual damages has not prevented excessive punitive awards. One leading authority has stated: “[V]ery large awards of punitive damages, ranging far out of all conceivable proportion to the amount found by way of compensation, have been sustained. A few courts have begun to repudiate outright the necessity of any ratio or relation.”⁵⁷

B. Conceptual Deductive Approach

A few courts have followed the “conceptual deductive” approach.⁵⁸ These courts draw upon agency principles and argue that a municipal corporation cannot be held liable for the malicious and willful acts of its agent or servant, since such conduct is unauthorized and beyond the scope of employment. *Doyle v. City of Sandpoint*⁵⁹ is illustrative of this approach. In denying the plaintiff’s demand for punitive damages against the City of Sandpoint for the alleged malicious acts of its officers, the court stated,

If the officers of the city acted maliciously and without probable cause . . . the act would be that of the individuals and not of the municipality. To act maliciously would be outside of the scope of official duty and authority and would become the personal act of the individual for which he and not the city would be responsible.⁶⁰

Most of the cases utilizing the “conceptual deductive” approach were decided in the late nineteenth century⁶¹ and are based upon

55. *Fisher v. City of Miami*, 160 So. 2d 57, 62 (Fla. Dist. Ct. App. 1964), *aff’d*, 172 So. 2d 455 (Fla. 1965) (Carroll, J., dissenting).

56. *Id.* See also Comment, 75 DICK. L. REV. 585, *supra* note 22.

57. W. PROSSER, *supra* note 21, § 2 at 14. See, e.g., *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941) (libel; one dollar actual and \$25,000 punitive); and *Toomey v. Farley*, 2 N.Y.2d 71, 138 N.E.2d 221, 156 N.Y.S.2d 840 (1956) (libel; six cents actual and \$5,000 punitive).

58. *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116, 132, 70 Am. Dec. 562, 566 (1858); *Doyle v. City of Sandpoint*, 18 Idaho 654, 549, 112 P. 204, 206 (1910); *McGary v. City of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (La. 1846).

59. 18 Idaho 654, 112 P. 204 (1910).

60. *Id.* at 659, 112 P. at 206.

61. *But see Drain v. Kosydar*, 54 Ohio St. 2d 49, 374 N.E.2d 1253 (1978):

Where it is alleged that the acts of a state employee were motivated by actual malice, or were acts which exhibited a wilful or wanton disregard for the health, safety and welfare of the general public, the usual prerequisites for assessment of exemplary damages, such conduct would certainly be outside the scope of state employment, and liability therefor will not be imputed to the state.

outmoded agency law that held that a "principal is never liable for the unauthorized, the wilful, or the malicious, act or trespass of his agent."⁶² The modern rule is that an employee's tort is not outside the scope of a private employer's business merely because it was done with malice, and numerous cases have imposed liability upon an employer for the malicious torts of his employee.⁶³ This modern rule is demonstrated in every decision that sanctions the recovery of punitive damages from a private corporation.⁶⁴ The "conceptual deductive" approach, therefore, should be disregarded by the courts as a relic of the past.

C. *Deferential Approach*

Courts following this approach oppose the award of punitive damages against a municipality on the basis of precedent. These courts suggest that legislative action is necessary to provide for punitive awards and that the judiciary should defer to the legislature and not assume the responsibility of imposing punitive liability on municipalities.⁶⁵ *Urban Renewal Agency of Aberdeen v. Tackett*⁶⁶ illustrates this approach. In that case a property owner sued the Urban Renewal Agency for willful trespass and destruction of certain ornamental trees. The court denied a request for punitive damages, stating that a "municipality is not liable for punitive damages because of the acts of its servants or agents unless authorized by statute. No such statute is cited, nor is one found by us."⁶⁷

This approach fails to consider the dim prospect of legislative action in this area. Very few states have laws permitting punitive damages against a municipality,⁶⁸ and it is unlikely that such laws

Id. at 56, 374 N.E.2d at 1257. (citation omitted).

62. J. STORY, COMMENTARIES ON THE LAW OF AGENCY § 456, at 623 (4th ed. 1851). *Accord*, *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416 (1849); *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507 (N.Y. 1838).

63. 2 F. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 1926, 1957-1972, at 1497, 1520-30 (1914); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 89, at 155 (1964); F. TIFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT § 38, at 109 (2d ed. 1924).

64. See notes 26-31 and accompanying text *supra*.

65. *Scott v. Abilene Independent School Dist.*, 438 F. Supp. 594, 599 (N.D. Tex. 1977); *Bennett v. City of Marion*, 102 Iowa 425, 71 N.W. 360 (1897), *overruled by*, *Young v. City of Des Moines*, 262 N.W.2d 612 (Iowa 1978); *McHugh v. City of Wichita*, 1 Kan. App. 2d 180, 563 P.2d 497 (1977); *Desforge v. City of West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Town of Newton v. Wilson*, 128 Miss. 726, 91 So. 419 (1922); *Fisher v. Kansas City*, 518 S.W.2d 138 (Mo. Ct. App. 1974); *Rascoe v. Town of Farmington*, 62 N.M. 51, 304 P.2d 575 (1956); *Brown v. Village of Deming*, 56 N.M. 302, 243 P.2d 609 (1952). See also *Clarke v. City of Greer*, 231 S.C. 327, 98 S.E.2d 751 (1957); *Lineberger v. City of Greenville*, 178 S.C. 47, 182 S.E. 101 (1935); *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975); *Cole v. City of Houston*, 442 S.W.2d 445 (Tex. Civ. App. 1969).

66. 255 So. 2d 904 (Miss. 1971).

67. *Id.* at 905 (citation omitted).

68. Some courts, however, have awarded punitive damages against a municipality based upon statutory authority. See, e.g., *Coffee County v. Parrish*, 249 Ala. 226, 30 So. 2d 578 (1947); *Myers v. City of San Francisco*, 42 Cal. 215 (1871); *City of Minneapolis v. Richardson*, 307 Minn. 80, 239 N.W.2d 197 (1976); *Earle v. Greenville County*, 215 S.C. 539, 56 S.E.2d 348

will be enacted in the near future. Many municipalities are currently in the midst of a fiscal crisis,⁶⁹ and the general sentiment of the public is against increased government spending.⁷⁰ State legislatures will not readily permit the recovery of punitive damages from a municipal corporation in these circumstances.⁷¹ Any expansion of punitive damages against a municipality will probably have to be accomplished by the judiciary. While the better rule would prohibit such damages against a municipality, the courts, nonetheless, should not avoid this question by deferring to the legislature. They should deal with the issue directly, and should justify their refusal to grant punitive damages on explicit grounds of public policy. This approach indeed might cause the legislature to act upon this question, if it found itself in disagreement with the determination of the judiciary.

In conclusion, while the functional, conceptual deductive, and deferential approaches all reach the same result, the latter two approaches offer inadequate justifications for their conclusions. The functional approach, however, is the better rationale because it offers the best arguments for denying punitive damages against a municipality. Therefore, this approach should be adopted by all courts.

IV. Cases in Which The Facts Do Not Require the Court to Address the Legal Issue

Not every case involving claims for punitive damages against municipal corporations requires a court to decide whether punitive damages may be imposed upon a municipality. A court may be able to deny punitive damages because the facts fail to disclose willful-

(1949). *Cf.* State Dep't of Corrections v. Workmen's Compensation Appeals Bd., 5 Cal. 3d 885, 489 P.2d 818, 97 Cal. Rptr. 786 (1971) (statute authorized damage award to be increased by one-half); Michaud v. City of Bangor, 160 Me. 285, 203 A.2d 687 (1964) (double and treble damages); Governale v. City of Owosso, 59 Mich. App. 756, 229 N.W.2d 918 (1975) (treble damages).

Other courts, however, have interpreted their statutes as prohibiting punitive damages against a municipality. *Dawkins v. City of Los Angeles*, 67 Cal. App. 3d 720, 136 Cal. Rptr. 882 (1977); *Burr v. Town of Plymouth*, 48 Conn. 460 (1881); *Newell v. City of Elgin*, 34 Ill. App. 3d 719, 340 N.E.2d 344 (1976); *McManus v. City of Madison Heights*, 366 Mich. 26, 113 N.W.2d 889 (1962); *Herrmann v. Fossum*, ___ Minn. ___, 270 N.W.2d 18 (1978); *Desforge v. City of West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Hunt v. City of Boonville*, 65 Miss. 620 (1877); *Woodman v. Town of Nottingham*, 49 N.H. 387 (1870). *Cf.* *University of Alas. v. Hendrickson*, 552 P.2d 148 (Alaska 1976) (statute prohibited punitive damages against state).

69. See Zelinsky, *The Cities and the Middle Class: Another Look at the Urban Crisis*, 1975 Wis. L. REV. 1081.

70. See, e.g., *California's Tax Revolt*, TIME, June 5, 1978.

71. One reason that the prospects for legislative action on tort claims against governmental entities are "impaired" is because the citizens injured by governmental torts "are dispersed and not of such an identifiable group that they might be mobilized into a collective voice so as to alert the legislature of their grievance." 25 MERCER L. REV. 969, 979 (1974). Moreover, any legislation would probably "not be retroactive, therefore, providing no incentive for the victims of past governmental torts to form pressure groups." *Id.*

ness, malice, outrageous conduct, or gross negligence. When these factual elements are not present, courts do not address the legal issue of whether a defendant's status as a public corporation should bar a plaintiff's recovery of punitive damages.⁷² This approach is consistent with the judicial policy of deciding a case on the most narrow ground possible.⁷³

An example of this type of case is *Gigler v. City of Klamath Falls*.⁷⁴ In *Gigler*, plaintiff was ordered removed from a city council meeting by the mayor. The plaintiff brought an action against the city, the mayor, and two police officers for assault and battery, false arrest, false imprisonment, malicious prosecution, and outrageous conduct. The court held that the removal of plaintiff from the meeting was not conduct so outrageous that he should be entitled to punitive damages.⁷⁵ Since the court remained silent on the question of the effect of defendant's status as a municipal corporation on punitive damages, *Gigler* and similar cases cannot be considered as implicitly authorizing the assessment of exemplary damages against a municipal corporation,⁷⁶ as has been suggested by some authorities.⁷⁷

V. View Permitting Punitive Damages Against a Municipality

Notwithstanding the majority view, several courts have authorized punitive damages against municipal corporations.⁷⁸ First, some courts that subscribe to the general rule prohibiting punitive damages against a municipality will allow an exception to this rule when

72. *City of Covington v. Faulhaber*, 177 Ky. 623, 197 S.W. 1065 (1917); *Gigler v. City of Klamath Falls*, 21 Or. App. 753, 537 P.2d 121 (1975); *Armstrong & Latta v. City of Philadelphia*, 249 Pa. 39, 94 A. 455 (1915); *Spencer v. Carlisle Borough*, 63 Pa. Super. Ct. 513 (1916); *City of Katy v. Waterbury*, 581 S.W.2d 757, 761 (Tex. Civ. App. 1979); *Moody v. City of Galveston*, 524 S.W.2d 583, 590 (Tex. Civ. App. 1975). See notes 122-29 and accompanying text *infra*.

73. *Cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (Court will not address a constitutional question presented by the record, if the case can be disposed of on some other ground).

74. 21 Or. App. 753, 537 P.2d 121 (1975).

75. *Id.* at 764, 537 P.3d at 126.

76. *Accord, Santucci v. Windber Borough*, 31 Som. 281, 284-85 (Pa. C.P. 1975); Annot., 19 A.L.R.2d 903, 907 (1951).

77. Some authorities incorrectly presume that the courts in these cases would have permitted an assessment of punitive damages against the municipal defendant had the requisite conduct for punitive damages been present. See, e.g., *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667, 683 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); Note, *Punitive Damage Liability of Municipal Corporations*, 22 WASH. & LEE L. REV. 126, 130-31 (1965) (both interpreting *Armstrong & Latta v. City of Philadelphia*, 249 Pa. 39, 94 A. 455 (1915), as impliedly permitting a punitive damage award against a municipal corporation). See also notes 122-29 and accompanying text *infra*.

78. See note 4 and accompanying text *supra*. The State of Michigan regards punitive damages as extra compensation for injured feelings or sense of outrage, rather than for punishment. See *Wise v. Daniel*, 222 Mich. 229, 190 N.W. 746 (1922). Michigan courts, therefore, have held that punitive damages are permitted against a municipal corporation. *Ray v. City of Detroit*, 67 Mich. App. 702, 242 N.W.2d 494 (1976).

there are extraordinary circumstances⁷⁹ or when either the citizens or superior officers of the municipality authorize or ratify the tortious conduct of an agent or employee of the municipality.⁸⁰ Second, a few courts, finding the rationale of the majority view unconvincing, have expressly allowed punitive damages against a municipality.⁸¹

A. Exceptions to the Majority Rule that Insulates Municipalities from Punitive Damage Liability

1. *Extraordinary Circumstances Doctrine*.—Some courts will permit punitive damages if “extraordinary circumstances” arise.⁸² In *Smith v. District of Columbia*,⁸³ the appellant recovered a verdict of \$7,000 for compensatory damages arising from a false arrest and assault. The District of Columbia Court of Appeals rejected his contention that the trial court erred in refusing to submit to the jury the question of the District’s liability for punitive damages. The court stated that “[a]bsent extraordinary circumstances not present here, we agree with the weight of authority and conclude the District of Columbia is not liable for punitive damages.”⁸⁴ The court, however, did not explain what circumstances would be sufficiently “extraordinary” to warrant the imposition of punitive damages.⁸⁵

In holding a municipal corporation not liable for punitive damages absent extraordinary circumstances, courts such as the *Smith* court seem to have adopted an ad hoc approach that permits an award of punitive damages against a municipality whenever the court deems the award necessary. Thus, even if a municipality’s conduct is willful, malicious, or outrageous according to traditional punitive damage standards,⁸⁶ it is, nevertheless, immune from exemplary damages if the court does not perceive the requisite extraordinary circumstances. On the other hand, the same court could possibly view conduct that does not satisfy the traditional test of punitive damages as an extraordinary circumstance, which would

79. See notes 82-87 and accompanying text *infra*.

80. See notes 88-95 and accompanying text *infra*.

81. See notes 96-105 and accompanying text *infra*.

82. *Rieser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977); *Smith v. District of Columbia*, 336 A.2d 831 (D.C. 1975); *Costich v. City of Rochester*, 68 App. Div. 623, 626, 73 N.Y.S. 835, 837 (1902); *Ostrom v. City of San Antonio*, 33 Tex. Civ. App. 683, 77 S.W. 829 (1903). See also *City of Chicago v. Martin*, 49 Ill. 241, 246, 95 Am. Dec. 590, 594 (1868) (“It is scarcely conceivable that a case could be made against a municipal corporation, justifying punitive damages”).

83. 336 A.2d 831 (D.C. 1975).

84. *Id.* at 832.

85. One federal court recently considered the *Smith* case, but found it unnecessary to “determine the outlines of the ‘extraordinary circumstances’ that might permit a punitive damages award against the District of Columbia.” *Rieser v. District of Columbia*, 563 F.2d 462, 482 (D.C. Cir. 1977).

86. See notes 19-31 and accompanying text *supra*.

render the municipal corporation liable for punitive damages.⁸⁷ In certain cases, therefore, the extraordinary circumstances doctrine may be a less stringent test than the traditional punitive damage test. This doctrine will remain an enigmatic one, however, until courts are presented with opportunities to explain what is meant by "extraordinary circumstances."

2. *Ratification or Authorization by Citizens or Superior Officers of the Municipality.*—Several courts that bar exemplary damages against a municipality will allow such damages when the citizenry has authorized or ratified the wrongful acts committed by the agents of the municipality.⁸⁸ The Supreme Court of Oklahoma is among the courts that have adopted this approach, holding that "a municipality may not be held liable for exemplary damages without adequate evidence to demonstrate that the citizenry of the municipality had acquiesced in the wrongful conduct to the point that reasonable men would agree that the citizens had condoned or approved the wrongful conduct."⁸⁹ The court adopted this rule in an effort "to shield the taxpaying public from the economic burden of damages unrelated to any injury actually sustained by the plaintiff, and yet leave open the possibility of recovery in the most flagrant cases."⁹⁰

New York courts utilize a similar approach, and hold that before a punitive damage award will be permitted against a municipality, the superior officials of the municipality must have ratified or authorized the tortious conduct.⁹¹ This view is analogous to the

87. The extraordinary circumstances doctrine could also be merely another way of expressing the traditional punitive damage standard, so that an extraordinary circumstance would occur any time a defendant acted willfully, wantonly, maliciously, or recklessly.

88. *Nixon v. Oklahoma City*, 555 P.2d 1283 (Okla. 1976); *City of Lawton v. Johnstone*, 123 Okla. 145, 252 P. 393 (1926); *San Antonio River Auth. v. Garrett Brothers*, 528 S.W.2d 266 (Tex. Civ. App. 1975); *Willett v. Village of St. Albans*, 69 Vt. 330, 38 A. 72 (1897); 2 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 412, at 1349-50 (1916). See also *Peace v. City of Center*, 372 F.2d 649 (5th Cir. 1967).

89. *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976).

90. *Id.*

91. *Lochhaas v. State*, 64 App. Div. 2d 816, 407 N.Y.S.2d 298 (1978).

New York courts are currently in a state of confusion on the question of municipal liability for punitive damages. Many courts have expressed uncertainty on the state of the law in New York. *Kieninger v. City of New York*, 53 App. Div. 2d 602, 384 N.Y.S.2d 11 (1976); *Chirieleison v. City of New York*, 49 App. Div. 2d 873, 373 N.Y.S.2d 361 (1975); *Eifert v. Bush*, 27 App. Div. 2d 950, 279 N.Y.S.2d 368 (1967), *aff'd*, 22 N.Y.2d 681, 238 N.E.2d 759, 291 N.Y.S.2d 372 (1967); *Snyder v. State*, 20 App. Div. 2d 827, 247 N.Y.S.2d 757 (1964). The majority of courts hold that the superior officials of the municipality must ratify or authorize the tortious conduct of the agent or employee before a municipality will be liable for punitive damages. *Bevilacqua v. City of Niagara Falls*, 66 App. Div. 2d 988, 411 N.Y.S.2d 779 (1978); *Lochhaas v. State*, 64 App. Div. 2d 816, 407 N.Y.S.2d 298 (1978); *Mastrodonato v. Town of Chili*, 39 App. Div. 2d 824, 333 N.Y.S.2d 89 (1972); *Costich v. City of Rochester*, 68 App. Div. 623, 73 N.Y.S. 835 (1902); *Nephew v. State*, 178 Misc. 824, 36 N.Y.S.2d 541 (Ct. Cl. 1942). Some New York courts allow punitive damages against a municipality without a showing of ratification or authorization. *Hayes v. State*, 80 Misc. 2d 498, 363 N.Y.S.2d 986 (Ct. Cl. 1975), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (1975), *aff'd*, 40 N.Y.2d 1044, 360 N.E.2d 959, 392 N.Y.S.2d 282 (1976); *Macord v. City of New Rochelle*, 179 Misc. 311, 39

"complicity rule" applicable to private corporations.⁹² This approach places a heavy burden of proof upon a plaintiff seeking to implicate a municipality in its employee's acts since evidence of authorization or ratification is almost always within the exclusive control of the municipal corporation.⁹³ It is not surprising, therefore, that only one reported case has held a municipality liable for punitive damages on the grounds that it ratified or authorized the malicious tort of its agent.⁹⁴ In *St. Johns Gas Co. v. City of San Juan*,⁹⁵ exemplary damages were permitted against the city when the mayor took unlawful possession of private property. The city retained control of the property for an extended period of time, and the court decided that this was sufficient ratification to hold the city liable for punitive damages.

B. Courts Expressly Permitting Punitive Damages Against a Municipal Corporation

A few recent decisions, stating a dissatisfaction with the rationale offered by a majority of courts, have expressly allowed punitive damages against a municipality.⁹⁶ In *Young v. City of Des Moines*⁹⁷ a jury returned a verdict against the City of Des Moines in an action for false arrest. The trial court, however, held as a matter of law that punitive damages were not recoverable from a municipality. On appeal, a majority of the Iowa Supreme Court disagreed and concluded "that under proper circumstances punitive damages are recoverable in tort claim actions against governmental subdivisions."⁹⁸ The court declared that the amount of exemplary damages must be left to the sound judgment of a jury, subject to judicial review, and that any question regarding the recovery of punitive damages from a municipal corporation must be determined by applying the same legal principles as in actions against private corporations.⁹⁹

The court discussed the public policy considerations that the

N.Y.S.2d 47 (Sup. Ct. 1942) (treble damages). See also *Williams v. City of New York*, 508 F.2d 356 (2d Cir. 1974); 40 N.Y. JURIS., *Municipal Corporations*, § 979 at 227 (1965).

92. See notes 26-27 and accompanying text *supra*.

93. See Comment, 54 CHI.-KENT L. REV. 829, *supra* note 28, at 846.

94. *St. Johns Gas Co. v. City of San Juan*, 1 P. R. Fed. 160 (1902).

95. *Id.*

96. *Young v. City of Des Moines*, 262 N.W.2d 612 (Iowa 1978); *Hayes v. State*, 80 Misc. 2d 498, 503-07, 363 N.Y.S.2d 986, 991-95 (Ct. Cl. 1975), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (1975), *aff'd*, 40 N.Y.2d 1044, 360 N.E.2d 959, 392 N.Y.S.2d 282 (1976). See also *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667, 682-83 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); *City of Miami v. McCorkle*, 145 Fla. 109, 199 So. 575 (1940); *Kelly v. Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1935), *overruled by*, *Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968); *Whipple v. Walpole*, 10 N.H. 130 (1839).

97. 262 N.W.2d 612 (Iowa 1978).

98. *Id.* at 622.

99. *Id.* See notes 26-31 and accompanying text *supra*.

majority of courts have accepted as barring a punitive damage award against a municipality.¹⁰⁰ It did not find the majority view persuasive,¹⁰¹ however, stating that "[v]irtually the same objections have been made and rejected as to private corporations."¹⁰² The court posited two additional reasons for permitting punitive damages against the City of Des Moines. First, such an award "will further deter unfounded and oppressive peace officer conduct under the guise of official action,"¹⁰³ and will cause municipalities to be more careful in the selection and training of its agents and employees.¹⁰⁴ Second, the court interpreted the state's Governmental Subdivision Tort Claims Act as permitting a recovery of punitive damages from a municipality.¹⁰⁵

The *Young* court, however, did not attempt to analyze and criticize the public policy considerations that justify prohibiting a punitive damage recovery from a municipality. Had it done so, the *Young* case might have caused other courts to reexamine their decisions insulating a municipality from punitive damage liability. By failing to show error in the rationale used by the majority of courts, and by partially basing its decision on a statute permitting a punitive award against a municipality, the *Young* opinion has not discredited the soundness of the policy reasons supporting the majority view that, in the absence of statutory authority, punitive damages are not recoverable from a municipal corporation.

VI. The Pennsylvania Problem

Pennsylvania law is currently clouded on the question of whether a municipal corporation can be liable for punitive damages. Federal¹⁰⁶ and state¹⁰⁷ courts, both interpreting Pennsylvania law,

100. See notes 34-57 and accompanying text *supra*.

101. Nearly all the commentators have also found the majority view unpersuasive, and have advocated awarding punitive damages against a municipality. Most stress the deterrent effect of such an award and argue that since private corporations are liable for punitive damages, a municipal corporation should also be liable for these damages. 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 11.204, at 245 (1979); Greenstone, *supra* note 49, at 412; Hines, *Municipal Liability for Exemplary Damages*, 15 CLEV.-MAR. L. REV. 304, 310-12 (1966); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 976; Note, *Municipal Corporations: Liability for Intentional Torts and Punitive Damages*, 18 U. FLA. L. REV. 173, 176-77 (1965); Note, 22 WASH. & LEE L. REV. 126, *supra* note 77, at 131-32; 2 OHIO N. L. REV. 818, 827 (1975); 7 U. TOL. L. REV. 624, 642 (1976). See also *Fisher v. City of Miami*, 160 So. 2d 57, 60-62 (Fla. Dist. Ct. App. 1964), *aff'd*, 172 So. 2d 455 (Fla. 1965) (Carroll, J., dissenting); *McGary v. City of Lafayette*, 12 Rob. 674, 678-82, 43 Am. Dec. 239, 242-46 (La. 1846) (Bullard, J., dissenting); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 9-10, 321 N.E.2d 885, 889-90 (1975) (Brown, J., dissenting).

102. 262 N.W.2d at 621.

103. *Id.* at 622.

104. *Id.*

105. *Id.* at 620, 622; IOWA CODE ANN. § 613A (West Supp. 1979-80).

106. *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667, 682-83 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969).

107. *Santucci v. Windber Borough*, 31 Som. 281 (Pa. C.P. 1975).

have reached different conclusions concerning this question. The Pennsylvania legislature has further complicated this problem by recently enacting a municipal tort claims act that neither clearly permits nor prohibits a punitive damage award against a municipal corporation in Pennsylvania.¹⁰⁸ Although respectable authority exists both supporting and opposing the imposition of punitive damages,¹⁰⁹ the correct interpretation of Pennsylvania law is that exemplary or punitive damages are not recoverable from a municipal corporation.

A. The Hermits of St. Augustine Case: Punitive Damages Are Not Recoverable from a Municipality

Order of Hermits of St. Augustine v. County of Philadelphia,¹¹⁰ an 1847 Pennsylvania Supreme Court decision, was the first Pennsylvania case in which a court considered the question of municipal tort liability for punitive damages. The court, sitting at nisi prius,¹¹¹ held that punitive damages could not be awarded against a municipal corporation. Plaintiff sought damages under a Philadelphia mob violence law for property destroyed in a riot. The statute imposed liability upon the County of Philadelphia for property destroyed within the county by a riot or violence.¹¹² After a recital of the facts, Mr. Justice Rogers gave the following jury instruction on punitive damages:

[T]he only question is as to the amount of the damages If lawless individuals are made to understand that the result of their violence will recoil upon themselves, they will pause in their career. . . . If this action were against the rioters and not against the county, I would instruct you to give exemplary damages; these, however, you cannot give against the county, but damages to the full extent of the injury you should give. . . . In a case like this against the county, I have said exemplary or vindictive damages cannot be given.¹¹³

108. See notes 157-74 and accompanying text *infra*.

109. See notes 110-56 and accompanying text *infra*.

110. 4 Clark 120, 7 Pa. L.J. 124 (1847).

111. By § 2 of the Act of June 16, 1836, entitled "An act Relative to the jurisdiction and powers of the Courts," the Supreme Court of Pennsylvania was given original jurisdiction within the City and County of Philadelphia in all civil actions when the matter in controversy was over five hundred dollars. 1836 Pa. Laws 784. When exercising its original jurisdiction, the supreme court acted as a nisi prius court, which was held for the trial of issues of fact before a jury and one presiding justice of the Supreme Court of Pennsylvania. Surrency, *The Development of the Appellate Function: The Pennsylvania Experience*, 20 AM. J. LEGAL HIST. 173, 181-87 (1976). The supreme court, sitting as an appellate court, could review a determination of one of its judges sitting at nisi prius. *Id.* at 184. The supreme court's nisi prius jurisdiction was abolished in 1874. PA. CONST. of 1874, art. 5, § 21. See *Deer Creek Drainage Basin Auth. v. Allegheny County Bd. of Elections*, 475 Pa. 491, 507 n.7, 381 A.2d 103, 111 n.7 (1977); 2 F. EASTMAN, COURTS AND LAWYERS OF PENNSYLVANIA: A HISTORY, 1623-1923, at 430, 529 (1922).

112. PA. STAT. ANN. tit. 16, § 11821 (Purdon 1956) (repealed 1970).

113. 4 Clark at 123, 7 Pa. L.J. at 126.

The court concluded that interest on the property from the time of its destruction to the time of trial could be awarded as part of compensatory damages, but should not be regarded as "vindictive damages."¹¹⁴

The *Hermits of St. Augustine* case, decided more than a century ago, maintains its precedential value on the issue of municipal tort liability for punitive damages. It is an emphatic statement by the highest court in the state that "any damages awarded against a municipal corporation must be compensatory and cannot be punitive."¹¹⁵ Since the *Hermits of St. Augustine* decision was at nisi prius, however, it cannot be given as much precedential weight as a decision of the supreme court sitting as an appellate court.¹¹⁶ Nonetheless, the decision is entitled to greater respect than other trial courts of the Commonwealth because it was written by a justice of the highest tribunal in the state.¹¹⁷ The *Hermits of St. Augustine* case, therefore, should be followed by Pennsylvania courts in the absence of other precedents.

B. Later State Court Decisions on a Municipality's Punitive Damage Liability

1. *Howell v. Borough of West Chester: Punitive Damages Impliedly Allowed.*—One state court decision, which did not cite *Hermits of St. Augustine*, impliedly held that under Pennsylvania law a municipal corporation could be liable for punitive damages. In *Howell v. Borough of West Chester*,¹¹⁸ the issue of municipal liability for punitive damages arose in a motion for a new trial. The jury had returned a verdict for plaintiff in a nuisance action against defendant borough for polluting a stream running through the plaintiff's property. The defendant moved for a new trial, contending that the court erred in submitting a punitive damages instruction to the jury.¹¹⁹ The court denied the motion, deciding that no error had been committed. Although the *Howell* case impliedly permitted a punitive damage award against a municipal corporation, the decision has lit-

114. *Id.* at 124, 7 Pa. L.J. at 127.

115. *Santucci v. Windber Borough*, 31 Som. 281, 286 (Pa. C.P. 1975). *See also* Annot., 19 A.L.R.2d 903, 908, 913 (1951) (cites *Hermits of St. Augustine* case as controlling decision on punitive damages against a municipality).

116. H. BLACK, *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS* § 40, at 112 (1912). *See also* note 111 and accompanying text *supra*.

117. *Surrency*, *supra* note 111, at 183.

118. 26 Lanc. 201 (Pa. C.P. 1909).

119. The court charged the jury as follows:

Then as I have said the plaintiff is entitled in addition to damages by way of compensation to have allowed by you in your verdict such sum as punitive or exemplary damages as in your opinion is proper, not only to punish it for continuing the nuisance if it has done so, but also to compel it to abate it if it has not already been abated.

Id. at 202.

the precedential value in light of the contrary supreme court decision in *Hermits of St. Augustine* expressly prohibiting an award of punitive damages against a municipal corporation. While both decisions were by nisi prius courts,¹²⁰ the *Hermits of St. Augustine* opinion is entitled to greater weight since it was a decision of the supreme court.¹²¹

2. *The Spencer and Armstrong Cases: Abstention from the Legal Issue.*—Two Pennsylvania appellate court decisions faced the legal issue of a municipality's liability for punitive damages, but neither addressed the question because the requisite elements for a punitive damage award were not present in the factual situations of these cases.¹²² Since these courts could not impose punitive damages under the particular facts presented, it was unnecessary to decide whether these damages were permissible in theory against a municipal corporation.

In the first case, *Spencer v. Carlisle Borough*,¹²³ an action was brought against the borough to recover damages to land resulting from laying a sewer in a portion of an alley owned by the plaintiff. A jury awarded the plaintiff two hundred dollars. The superior court reversed, holding that the evidence presented was insufficient to sustain the damages awarded by the trial court. In considering whether the verdict could be upheld as a punitive damage award, the court stated that punitive damages could be awarded only if the borough had "wilfully, maliciously or wantonly disregarded the rights of the complaining party."¹²⁴ The court, however, concluded that the action on the part of the borough did not warrant an award of punitive damages.¹²⁵

In *Armstrong & Latta v. City of Philadelphia*,¹²⁶ the plaintiffs sued the city in replevin for some equipment owned by plaintiffs and retained by city officers, who believed that it belonged to another contractor. In discussing the measure of damages, the Supreme Court of Pennsylvania stated,

Exemplary damages may be allowed in cases where there have been particular circumstances of fraud, oppression, or wrong in the taking or detention of property. There being no evidence in this case to support a claim for such damages the only question is as to the proper measure to compensate plaintiffs. . . .¹²⁷

120. See note 111 and accompanying text *supra*.

121. See notes 112-17 and accompanying text *supra*. See also *Santucci v. Windber Borough*, 31 Som. 281, 284 (Pa. C.P. 1975).

122. See notes 72-77 and accompanying text *supra*.

123. 63 Pa. Super. Ct. 513 (1916).

124. *Id.* at 516.

125. *Id.*

126. 249 Pa. 39, 94 A. 455 (1915). The *Armstrong* case is discussed in Note, 22 WASH. & LEE L. REV. 126, *supra* note 77, at 131.

127. 249 Pa. at 45, 94 A. at 457 (citation omitted).

This is the only reference to punitive damages in the decision. The remainder of the opinion examines the measurement of compensatory damages. Since neither the *Armstrong* nor *Spencer* cases address the question of whether a defendant's status as a public corporation should bar a plaintiff from recovering punitive damages, neither can be treated as precedent on the issue of municipal liability for punitive damages¹²⁸ and, therefore, do not diminish the authority of *Hermits of St. Augustine*.¹²⁹

C. Federal Court Decisions in Pennsylvania

*New Castle Products, Inc. v. School District of Blair Township*¹³⁰ was an action brought in federal district court in which plaintiff sought compensatory and punitive damages for conversion. The materials converted were valued at approximately \$2,000, and the balance of plaintiff's claim for \$3,500 was based on punitive damages. The district court held that a municipal corporation could not be liable for punitive damages except under express statutory authority and dismissed the case for lack of the \$3,000 jurisdictional amount.¹³¹

New Castle Products was decided prior to the United States Supreme Court decision in *Erie Railroad Co. v. Tompkins*,¹³² which held that in diversity cases a district court must apply the law that a state court in the forum state would have applied had the case been tried there. Prior to *Erie*, the federal district courts were free to ignore the state rules, and could fashion a general federal common law. The court in *New Castle Products* was fashioning such common law when it stated:

128. The *Armstrong* and *Spencer* cases, therefore, should not be interpreted as implicitly permitting a punitive damage award against a municipal corporation as has been suggested by some authorities. See, e.g., *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667, 683 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); *New Castle Prod., Inc. v. School Dist. of Blair Township*, 18 F. Supp. 335, 336 (W.D. Pa. 1936); Note, 22 WASH. & LEE L. REV. 126, *supra* note 77, at 130-31. See also note 77 and accompanying text *supra*.

129. Two courts have called the language in the *Armstrong*, *Spencer*, and *Howell* cases on the subject of punitive damages "dicta." *New Castle Prod., Inc. v. School Dist. of Blair Township*, 18 F. Supp. 335, 336 (W.D. Pa. 1936); *Santucci v. Windber Borough*, 31 Som. 281, 284 (Pa. C.P. 1975). It seems clear, however, that the language in these cases cannot be considered dicta. See *Commonwealth v. Almeida*, 362 Pa. 596, 603, 68 A.2d 595, 599 (1949), *cert. denied*, 339 U.S. 924 (1950) (quoting *New York Cent. & H. R.R. Co. v. Price*, 159 F. 330, 332 (1st Cir. 1908)) ("Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the court's ruling in respect thereto can, in no just sense, be called mere dictum"). See also *Gillespie v. United States Steel Corp.*, 321 F.2d 518 (6th Cir. 1963) (when matter is before the court, argued before the court, and passed upon by the court, the language in the opinion in respect thereto is not dicta); *Commonwealth ex rel. Fox v. Swing*, 409 Pa. 241, 186 A.2d 24 (1962) (adjudication of issue squarely raised in proceedings both in lower court and in supreme court was not dicta when issue was plainly an intricate embodiment of supreme court's determination).

130. 18 F. Supp. 335 (W.D. Pa. 1936).

131. *Id.* at 337. Jurisdiction was based on diversity of citizenship.

132. 304 U.S. 64 (1938).

The question of the liability of a municipal corporation, or a quasi municipal corporation, for punitive damages has not been passed upon by the appellate courts of Pennsylvania. There is dicta indicating such liability by municipal corporations. *Armstrong & Latta v. City of Philadelphia*, . . . *Spencer v. Carlisle Borough*, . . . *Hermits of St. Augustine v. County of Philadelphia*, . . . *Howell v. Borough of West Chester*

The great weight of authority outside of Pennsylvania is to the effect that municipal corporations are not liable for punitive damages. . . . I am in accord with the [latter] rule.¹³³

As the above passage indicates, the *New Castle* opinion cited *Hermits of St. Augustine* for exactly the opposite principle for which it stands.¹³⁴ That case *prohibited*, rather than permitted, a punitive damage award against a municipal corporation. The court in *New Castle Products* pointed out that the great weight of authority outside of Pennsylvania prohibits punitive damages against municipal corporations. The district court based its holding upon the belief that the better reasoning supports that position. The author of the *New Castle* opinion, however, had firm support in Pennsylvania law had he read the *Hermits of St. Augustine* decision properly.¹³⁵

Another federal district court decision, *Hennigan v. Atlantic Refining Co.*,¹³⁶ involved a wrongful death action against the City of Philadelphia and an oil company for the death of workmen killed in a sewer explosion. The jury found that the city was negligent for allowing gaseous vapors to accumulate in the sewer, and that this negligence was a proximate cause of the explosion.¹³⁷ Moreover, the jury found that the negligence of the city amounted to such a degree of reckless disregard for the safety of others that an award of punitive damages were warranted.¹³⁸ Accordingly, punitive damages of \$75,000 were awarded against the city.¹³⁹

The district court, considering the question on a motion for a new trial, held that Pennsylvania law permitted a recovery of punitive damages against the City of Philadelphia.¹⁴⁰ The opinion stated that the *New Castle* decision was not controlling because it was rendered before *Erie Railroad Co. v. Tompkins*. Quoting from the *New Castle* case, the court stated that Pennsylvania case law permits punitive damages against a municipality. The *Hennigan* court, mistakenly relying on the *New Castle* court's erroneous interpretation of Pennsylvania decisional law, incorrectly cited *Hermits of St. Augus-*

133. 18 F. Supp. at 336-37 (citations omitted).

134. See Santucci v. Windber Borough, 31 Som. 281, 286 (Pa. C.P. 1975).

135. *Id.* at 287.

136. 282 F. Supp. 667, 682-83 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969).

137. *Id.* at 677-78.

138. *Id.* at 682.

139. *Id.* at 689.

140. *Id.* at 683.

tine as supporting the proposition that punitive damages could be awarded against a municipal corporation.¹⁴¹ The court in *Hennigan*, therefore, erred in not correctly applying the *Hermits of St. Augustine* decision to the punitive damage issue under consideration.¹⁴²

In *Hennigan*, the court also held that the general common-law rule that punitive damages may not be awarded against a municipal corporation was modified or changed by the City of Philadelphia's ordinance that waived any immunity from tort liability of the city.¹⁴³ This ordinance provides that injured persons "shall have the right to bring suit against the City *in accordance with the same rules of law* as applied by the Courts of this Commonwealth *against any other party defendant*."¹⁴⁴ This interpretation of the ordinance ignores numerous decisions that have held that the language of an ordinance relied upon for the award of punitive damages must clearly express the intent to permit such damages, and that ambiguous language or language capable of other construction will not suffice for this purpose.¹⁴⁵ The city ordinance in question does not clearly and unambiguously express this intention. Moreover, the language of the ordinance is capable of other construction.¹⁴⁶ The better inter-

141. *Id.*

142. Under the *Erie* doctrine, the *Hennigan* court was obligated to follow the *Hermits of St. Augustine* decision even though the case was decided at nisi prius. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). *But see* *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948); *United States v. Wyoming Nat'l Bank of Casper*, 505 F.2d 1064 (10th Cir. 1974); *Louthian v. State Farm Mut. Ins. Co.*, 493 F.2d 240 (4th Cir. 1973). *See also* C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 58, at 267-68 (1976).

143. 282 F. Supp. at 683.

144. The Philadelphia Code provides as follows:

§ 21-701 Acts of City Employees. (a) Any person sustaining bodily injury or death caused by the negligence or unlawful conduct of any employee of the City, while the employee is acting within the scope of his office or employment, shall have the right to bring suit against the City in accordance with the same rules of law as applied by the Courts of this Commonwealth against any other party defendant. In such suits the City shall not plead governmental immunity as a defense.

PHILADELPHIA CODE ch. 21-700, § 21-701(a) (1962). This ordinance lost its original purpose and necessity when the Supreme Court of Pennsylvania abolished governmental immunity in 1973. *See* notes 9-14 and accompanying text *supra*.

145. *New Castle Prod., Inc. v. School Dist. of Blair Township*, 18 F. Supp. 335 (W.D. Pa. 1936); *Michaud v. City of Bangor*, 160 Me. 285, 203 A.2d 687 (1964); *Desforge v. City of West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975); *Longfellow v. City of Seattle*, 76 Wash. 509, 136 P. 855 (1913). *See generally* Annot., 19 A.L.R.2d 903, 912 (1951).

146. *See, e.g.,* *Drain v. Kosydar*, 54 Ohio St. 2d 49, 56, 374 N.E.2d 1253, 1257 (1978), in which the court interpreted the following statute as not permitting a punitive damage award against the State of Ohio: "The state hereby waives . . . its immunity from liability and consents to be sued, and have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties . . ." OHIO REV. CODE ANN. § 2743.02(A) (Baldwin 1978) (emphasis added). *See also* *Nephew v. State*, 178 Misc. 824, 826, 36 N.Y.S.2d 541, 543 (Ct. Cl. 1942) in which the court interpreted the following statute as not allowing a punitive damage award against the State of New York: "The state hereby waives its immunity from liability . . . and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations . . ." N.Y. CT. CL. ACT (29A) § 8 (McKinney 1963) (emphasis added). *Cf. Delong v. City of Denver*, ___ Colo. ___, 576 P.2d 537 (1978) (the Denver city charter contains no monetary limitation on

pretation of this ordinance, therefore, is that it does not permit punitive damages against the city.¹⁴⁷

D. Santucci v. Windber Borough: Correct Interpretation of Pennsylvania Law

The only post-*Hennigan* case to consider liability of Pennsylvania municipalities for punitive damages has examined the *Hennigan* decision and has concluded that the federal court erred in its interpretation of Pennsylvania law.¹⁴⁸ *Santucci v. Windber Borough*¹⁴⁹ was an action against the borough for nonfeasance on the part of the borough police. The case came before the court on preliminary objections to the punitive damage request in the plaintiff's complaint. Citing *Order of Hermits of St. Augustine v. County of Philadelphia*¹⁵⁰ as precedent, the court held that in Pennsylvania a municipal corporation cannot be held liable for punitive damages.¹⁵¹ Judge Shaulis, who wrote the opinion in the *Santucci* case, gave two reasons why he refused to follow the decision in *Hennigan*. First, he believed that *Hennigan* misinterpreted the *Hermits of St. Augustine* case¹⁵² and erred in ignoring the great weight of authority outside of Pennsylvania that holds that municipal corporations are not liable for punitive damages.¹⁵³ Second, the judge noted that a federal court's decision on state law is not binding on a state court: "Regardless of the federal courts [sic] position or its interpretation of Pennsylvania Law, the state courts are the proper forum to declare state law. The federal decisions may be persuasive but are not stare decisis."¹⁵⁴ The *Santucci* opinion is the most recent Pennsylvania state court decision on municipal liability for punitive damages and is a correct interpretation of Pennsylvania law on this issue.¹⁵⁵ Its holding and rationale should be followed by Pennsylvania courts

damages and makes Denver liable in the same manner and to the same extent as a private employer under like circumstances).

147. The *Hennigan* court's claim that the city was liable for punitive damages because it was engaged in a proprietary, as distinguished from a governmental, function is irrelevant today in light of the abolition of such a distinction in Pennsylvania. See *Ayala v. Philadelphia Bd. of Educ.*, 453 Pa. 584, 305 A.2d 877 (1973). Nonetheless, this device of applying the proprietary-governmental distinction to the issue of a municipality's liability for punitive damages has been criticized and rejected in *George v. Chicago Transit Auth.*, 58 Ill. App. 3d 692, 374 N.E.2d 679, 681 (1978).

148. *Santucci v. Windber Borough*, 31 Som. 281, 283-88 (Pa. C.P. 1975).

149. *Id.*

150. See notes 110-17 and accompanying text *supra*.

151. 31 Som. at 289.

152. *Id.* at 286. See notes 136-42 and accompanying text *supra*.

153. 31 Som. at 288. See note 2 and accompanying text *supra*.

154. 31 Som. at 287.

155. The *Santucci* court, however, was not correct in assuming that the *Hermits of St. Augustine* case was a decision of the supreme court sitting as an appellate court. See *id.* at 285 and note 111 and accompanying text *supra*.

when confronted with this issue in the future.¹⁵⁶

E. The Political Subdivision Tort Claims Act

On November 26, 1978, the Pennsylvania legislature enacted the Political Subdivision Tort Claims Act,¹⁵⁷ which provides a comprehensive procedure for presenting tort claims against political subdivisions in Pennsylvania and substantially limits the tort liability of these entities.¹⁵⁸ The Act applies only to causes of action that arose after January 25, 1979, the effective date of the Act.¹⁵⁹ The Act, therefore, has no bearing on a municipality's liability for punitive damages resulting from causes of action that arose prior to that date.

Under the new Act, a municipality's liability may only arise when a municipal employee's negligent acts or omissions occur within the scope of his office or duties,¹⁶⁰ and even then only in cases falling within one of eight general categories.¹⁶¹ These eight categories relate primarily to the operation of motor vehicles and the condition, operation, and maintenance of real estate, buildings, and other municipal facilities in the control of the local government.¹⁶² The Act also insulates a municipality from liability for the willful or malicious conduct of one of its employees.¹⁶³ Thus, it would seem that a municipality could not be liable for punitive damages. Pennsylvania, however, has adopted Section 908 of the Restatement of Torts,¹⁶⁴ which states that punitive damages are "awarded against a

156. The plaintiff in *Santucci* argued that the abolition of governmental immunity in Pennsylvania also took away a municipality's immunity from punitive damages. The court properly rejected this argument, stating that it "misses the point," as the "punitive damages issue is completely separate from the issue of immunity. The punitive damages doctrine does not violate the municipal liability doctrine, it merely defines for reasons of public policy the degree to which the municipality will be held responsible." 31 Som. at 288. Cf. *George v. Chicago Transit Auth.*, 58 Ill. App. 3d 692, ___, 374 N.E.2d 679, 681 (1978) (the abrogation of the doctrine of governmental immunity does not abolish a municipality's immunity from punitive damages).

157. 53 PA. CONS. STAT. ANN. § 5311.101 (Purdon Supp. 1979-80). See notes 15-17 and accompanying text *supra*.

158. Section 402 of the Act provides the following: "Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$500,000 in the aggregate." 53 PA. CONS. STAT. ANN. § 5311.402 (Purdon Supp. 1979-80). This section, however, may violate the Pennsylvania Constitution, which provides in pertinent part: "[I]n no . . . cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property . . ." PA. CONST. art. 3, § 18. See *Singer v. Sheppard*, 464 Pa. 387, 408-13, 346 A.2d 897, 907-10 (1975) (Eagen, J., dissenting).

159. 53 PA. CONS. STAT. ANN. § 5311.803 (Purdon Supp. 1979-80).

160. *Id.* § 5311.202(a)(2).

161. See *id.* § 5311.202(b).

162. *Id.* The classifications in the Act that establish when a person may or may not sue a political subdivision may violate the equal protection clause of the United States Constitution. See *Singer v. Sheppard*, 464 Pa. 387, 414-15, 346 A.2d 897, 910-11 (1975) (O'Brien, J., dissenting).

163. 53 PA. CONS. STAT. ANN. §§ 5311.202(a)(2), 5311.307 (Purdon Supp. 1979-80).

164. See note 19 and accompanying text *supra*.

person to punish him for his *outrageous conduct*.”¹⁶⁵ In Pennsylvania, therefore, malicious or willful conduct is not a necessary prerequisite to an award of punitive damages—outrageous conduct will suffice. Thus, the provision of the new Act that immunizes a municipality from liability for the malicious or wilful acts of its employees does not in and of itself prohibit an award of punitive damages against a municipal corporation.

The most important part of the Act pertaining to the punitive damage issue is Chapter Four.¹⁶⁶ Section 403¹⁶⁷ of this chapter lists the types of losses recognized under the Act. One commentator has written that because the list in Section 403 is stated to be exclusive, and because the Act does not mention punitive damages, the Act prohibits a punitive damage award against a municipality.¹⁶⁸ This analysis, however, does not take into consideration that Section 403 is entitled “Types of *losses* recognized.” A credible interpretation of Section 403 is that by intentionally using this specific title,¹⁶⁹ the leg-

165. RESTATEMENT OF TORTS § 908 (1939) (emphasis added).

166. 53 PA. CONS. STAT. ANN. § 5311.401 (Purdon Supp. 1979-80).

167. 53 PA. CONS. STAT. ANN. § 5311.403 (Purdon Supp. 1979-80), which provides as follows:

Section 403. *Types of losses recognized.*

Damages shall be recoverable *only* for:

(1) Past or future loss of earnings and earning capacity.

(2) Pain and suffering in the following instances:

(i) death; or

(ii) only in cases of permanent loss of a bodily function, permanent disfigurement or permanent dismemberment where the medical and dental expenses referred to in paragraph (3) are in excess of \$1,500. (3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.

(4) Loss of consortium.

(5) Loss of support.

(6) Property losses.

(emphasis added).

168. Aman, *Practicing Under the New Pennsylvania Municipal Tort Claims Act*, 50 PA. B.A.Q. 122, 126 (1979).

169. See Statutory Construction Act of 1972, 1 PA. CONS. STAT. ANN. § 1924 (Purdon Supp. 1979-80) (although not controlling, section headings may be used to aid in the construction of statutes). *Accord*, *Starr & Sons, Inc. v. Stepp*, 206 Pa. Super. Ct. 15, 211 A.2d 78 (1965); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.14, at 93-97 (4th ed. C. Sands 1973). The Sovereign Immunity Act, 42 PA. CONS. STAT. ANN. § 5110 (Purdon Supp. 1979), which establishes a procedure for bringing tort claims against the Commonwealth, has a similar provision limiting the types of damages recoverable against the Commonwealth. Section 5111(b) of that Act provides the following:

(b) *Types of damages recoverable.* - Damages shall be recoverable *only* for:

(1) Past and future loss of earnings and earning capacity.

(2) Pain and suffering.

(3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.

(4) Loss of consortium.

(5) Property losses, except property losses shall not be recoverable in claims brought pursuant to section 5110(a)(5).

42 PA. CONS. STAT. ANN. § 5111(b) (Purdon Supp. 1979) (emphasis added). This section does

islature intended this section to place limitations only on *compensatory* damages. A court, therefore, could reasonably interpret Section 403 as having no bearing on the issue of punitive damages and hold that because the Act does not mention exemplary damages they may be recovered from a municipal corporation.

Earlier versions of the Act, however, seem to indicate that it was the intent of the legislature to prohibit a punitive damage award against a political subdivision. One draft of the Act, which unanimously passed the Pennsylvania Senate,¹⁷⁰ contained the following provision: "No award for damages shall include punitive or exemplary damages"¹⁷¹ The House of Representatives also passed an amended version of the Senate bill with an identical provision prohibiting punitive damages.¹⁷² This amended bill was sent to a conference committee, which completely redrafted the bill¹⁷³ and, in the process, omitted the provision prohibiting an award of exemplary damages.

While the Political Subdivision Tort Claims Act does not clearly prohibit a recovery of punitive damages from a municipal corporation, neither does it explicitly authorize the granting of such an award.¹⁷⁴ Because of this ambiguity in the Act, courts will have to look exclusively to the case law to resolve whether a Pennsylvania municipality may be liable for punitive damages.

VII. Conclusion

In the overwhelming majority of jurisdictions, exemplary or punitive damages are not recoverable from a municipal corporation unless expressly authorized by statute. Sound reasons of public policy support this general rule. The punitive and deterrent purposes of punitive damages are not fulfilled when permitted against a municipality because they would be borne by the taxpayers, who are guilty of no wrongdoing and are in no position to exert direct control to prevent future misconduct. The only effect of a punitive damage award against a municipality is to allow a windfall for plaintiffs.

not have the heading "Types of *losses* recognized," which is found in § 403 of the Political Subdivision Tort Claims Act, 53 PA. CONS. STAT. ANN. § 5311.403 (Purdon Supp. 1979-80). Because § 5111(b) of the Sovereign Immunity Act does not use this heading, and since the section is stated to be exclusive and the Act does not mention punitive damages, this section should be interpreted as forbidding a recovery of punitive damages from the Commonwealth. See JOINT STATE GOVERNMENT COMMISSION, GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, SOVEREIGN IMMUNITY, 20 (1978) (recommended that the General Assembly enact a bill that insulates the Commonwealth from punitive damage liability).

170. See Aman, *supra* note 168, at 123.

171. S. 1477, 1978 Sess., § 103, Printer's No. 2010.

172. S. 1477, 1978 Sess., § 103, Printer's No. 2163. See Aman, *supra* note 168, at 123.

173. See Aman, *supra* note 168, at 123.

174. See *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 6, 321 N.E.2d 885, 888 (1975) (language of a statute relied upon for the award of punitive damages against a municipality must clearly express the intent to permit such damages).

The best method to deter municipal employee wrongdoing is to have the punitive damage award assessed only against the guilty employee, based on his own financial resources.¹⁷⁵ This would be the most effective way to punish and deter malicious conduct of municipal employees.

The Pennsylvania legislature should amend its Political Subdivision Tort Claims Act by adding a provision that explicitly prohibits a punitive damage award against a municipal corporation.¹⁷⁶ Until such an amendment is enacted, however, Pennsylvania courts should follow the majority rule that prohibits punitive damage awards against a municipal corporation.

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175. Municipal employees can be liable for punitive damages in their individual capacities. *Euge v. Trantina*, 422 F.2d 1070 (8th Cir. 1970); *Wrains v. Rose*, 175 So. 2d 75 (Fla. Dist. Ct. App. 1965); *Fisher v. City of Miami*, 160 So. 2d 57 (Fla. Dist. Ct. App. 1964), *aff'd*, 172 So. 2d 455 (Fla. 1965); *Nelson v. Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912); *Board of Comm'rs of Rogers County v. Baxter*, 113 Okla. 280, 241 P. 752 (1925). *Cf.* *Hutchins v. City of Hialeah*, 196 So. 2d 741 (Fla. 1967) (recovery against city for assault and battery by employee of city cannot exceed recovery against its employee); *Chupp v. Henderson*, 134 Ga. App. 808, 216 S.E.2d 366 (1975) (if several defendants are sued jointly, exemplary damages are not recoverable against any of them unless all are liable therefor). *See also* Section 301 of the Political Subdivision Tort Claims Act, which provides as follows: "An employee of a political subdivision is liable for civil damages on account of any injury to a person or property caused by his acts or omissions *only to the same extent as his employing political subdivision . . .*" 53 PA. CONS. STAT. ANN. § 5311.301 (Purdon Supp. 1979-80) (emphasis added). Thus, according to § 301, if a court construes the Act as prohibiting an exemplary damage award against political subdivisions, it must hold that municipal employees are also insulated from punitive damage liability.

176. Many states have laws that explicitly prohibit recovery of punitive damages against a municipal corporation. *See, e.g.*, CAL. GOV'T CODE § 818 (West 1966); 2 IDAHO CODE § 6-918 (1978 Supp.); ILL. ANN. STAT. ch. 85, § 2-102 (Smith-Hurd 1966); IND. CODE ANN. § 34-4-16.5-4 (Burns Supp. 1979). *Cf.* Federal Tort Claims Act of 1946, 28 U.S.C. § 2674 (1971) (prohibits award of punitive damages against federal government); ALASKA STAT. § 09.50.280 (1973) (prohibits punitive damages against state); ARIZ. REV. STAT. § 41-621(h) (West Supp. 1979-80) (forbids exemplary damage award against state).